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The Ripple Effect of COVID-19 on Workers' Compensation

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About Michael Sullivan & Associates LLP

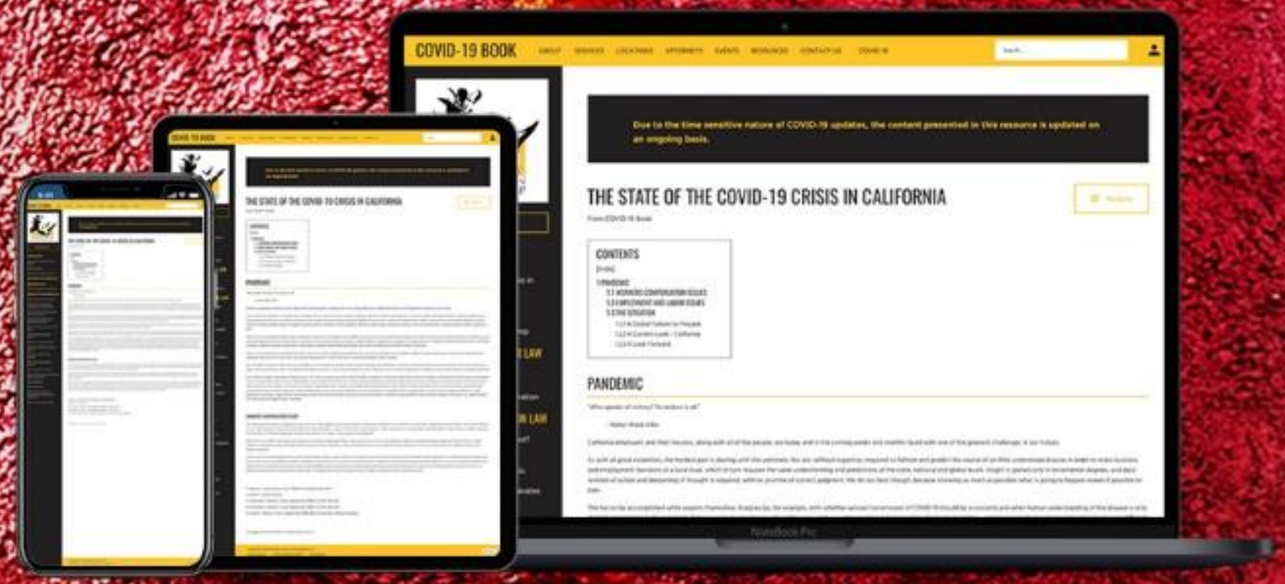
- The firm provides high-quality litigation in defense of workers' compensation claims, employment issues, immigration law and insurance litigation.

- Offices in El Segundo, Fullerton, San Diego, Westlake Village, Ontario, Fresno, Emeryville, Sacramento and San Jose.

- Author of "Sullivan on Comp," which covers the complete body of California workers' compensation law.

Navigating COVID-19:

A Legal Guide for California Employers



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COVID-19 Webinar Series

- Part 1: Workers' Compensation Liability & Employment Law Practices for the Coronavirus
- Part 2: The Interactive Process and Reasonable Accommodation
- Part 3: COVID-19 Update – the Burning Issues
- Part 4: COVID-19 Update – Duty to Provide a Claim Form
- Part 5: COVID-19 Update – Liability for Temporary Disability Benefits
- Part 6: COVID-19 Update – When is COVID-19 Work-Related?
- Part 7: COVID-19 Update – Interplay Between COVID-19 and Other Conditions
- Part 8: Gov. Newsom's New Executive Order re COVID-19 and What it Means Now
- Part 9: COVID-19 Update – Psychiatric Injuries
- Part 10: COVID-19 Update – Planning for Return to Work

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Plan For This Session

- COVID-19 and pre-existing conditions.
- Psychiatric injury as a result of COVID-19.
- Cal/OSHA and OSHA reporting requirements.
- Independent Contractor Misclassification.
- Guidance for Employers.

COVID-19 and Pre-existing Medical Conditions

- People with pre-existing medical conditions (such as high blood pressure, heart disease, lung disease, cancer or diabetes) have a higher mortality rate from COVID-19. One early study showed:

PRE-EXISTING CONDITION	DEATH RATE
Cardiovascular Disease	10.5%
Diabetes	7.3%
Chronic Respiratory Disease	6.3%
Hypertension	6.0%
Cancer	5.6%
No Pre-Existing Condition	0.9%

COVID-19 and Industrial Medical Conditions

- What if an employee with an industrial heart condition, respiratory condition, diabetes, or hypertension dies as a result of COVID-19?
- It likely doesn't matter whether the COVID-19 was industrially-related if the employment was a contributing cause of the death.
- What if an employee has a prior award for a heart condition or hypertension and isn't even working for the employer at the time of death from COVID-19?
- The employee may be able to bring a death claim so long as it is not barred by the statute of limitations.

Industrial COVID-19 Aggravates Nonindustrial Conditions

- The opposite also is true. An employer would be liable if an employee contracts COVID-19 on an industrial basis, and the disease aggravates or accelerates a nonindustrial condition.
  - If an employee with nonindustrial chronic lung disease dies as a result of COVID-19 contracted at work, the death would be compensable.
  - If the employer required hospitalization because of both industrial COVID-19 and nonindustrial lung condition, the employer would be fully liable for the treatment.
  - If the industrial COVID-19 permanently aggravates nonindustrial lung condition, the employer could be liable for any increased PD.

Treatment of COVID-19

- If there is industrial aggravation of a nonindustrial condition, the employer is fully liable for the treatment without apportionment of medical care. (***Granado v. Workers' Comp. Appeals Bd.*** (1968) 69 Cal.2d 399.)

- If an employee contracts COVID-19 on an industrial basis and it only a temporary aggravates or exacerbates a nonindustrial condition, the employer may avoid lifetime care for the nonindustrial condition.

- Whether the COVID-19 causes a temporary exacerbation or permanent aggravation depends on the medical evidence.

Liability for Psychiatric Injury

- Labor Code § 3208.3(a) provides, "A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for treatment.”

- Labor Code § 3208.3(b) states, "In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury."

Actual Events of Employment

- The phrase “actual events of employment” is not defined in the Labor Code.
- In ***Pacific Gas & Electric Co. v. Workers' Comp. Appeals Bd.*** (2004) 114 Cal.App.4th 1174, the Court of Appeal held that "broad societal events or trends do not satisfy this requirement of section 3208.3 subdivision (b)(1) because they cannot reasonably be said to be events which arise out of the employment relationship."
- The court determined that generalized anxiety over one's future in a company struggling to survive during difficult economic times, and fear of job loss due to management strategies, such as “outsourcing” of jobs to an overseas workforce for increased profitability, were not actual events of employment.
- It determined that corporate downsizing alone cannot reasonably support an award of benefits because "Allowing employees to recover benefits for psychiatric injuries caused by this type of stress would subject employers to virtually unlimited liability.“

Actual Events of Employment

- In ***Pacific Gas,*** the court determined that an employee's stock losses could not support an award because the investment loss was no different from that experienced by the general investing public.

- It also determined that an employee's concern over the future of his company and his retirement funds did not satisfy the requirement of § 3208.3(b)(1).

- The court, however, concluded the employee reassignment to a new position that required him to interact with irate customers, which could support an award.

- It found that the stress was a direct consequence of the new work assignment, an event of his particular employment and a compensable cause of his psychic injury.

Application of Actual Events of Employment Requirement to COVID-19

- Employees' general concerns about their future and the future of their companies due to the difficult economic times caused by coronavirus do not satisfy the requirements of § 3208.3(b)(1).

- But changes in the workplace in response to the coronavirus that affect employees might qualify.

- Actual events of employment could include:
  - A change in job assignment.
  - Changes in work duties or working conditions.
  - Stress related to implementation of new technology.

- Working from home as an “actual event of employment”?

Predominant Cause

- Predominant cause requires that work-related factors constitute more than 50 percent of the causal factors. (***Dep't of Corr. v. Workers' Comp. Appeals Bd. (Garcia)*** (1999) 76 Cal. App. 4th 810, 816.)

- Section 3208.3(b)(2) slightly reduces the threshold to a "substantial cause" if an employee's "injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act.“ A substantial cause is “at least 35 to 40 percent of the causation from all sources combined.”

- A “violent act” is “an act that is characterized by either strong physical force, extreme or intense force, or an act that is vehemently or passionately threatening.” (***Wilson v. State of CA Cal Fire*** (2019) 84 Cal. Comp. Cases 393.)

- It is unlikely that exposure to COVID-19 alone would qualify as a violent act.

Good Faith Personnel Action

- Labor Code § 3208.3(h) states, “No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action.“
- "[T]he Legislature's 'good faith personnel action' exemption is meant to furnish an employer a degree of freedom in making its regular and routine personnel decisions (such as discipline, work evaluation, transfer, demotion, layoff, or termination).” (***City of Oakland v. Workers' Comp. Appeals Bd.*** (2002) 99 Cal. App. 4th 261, 267.)
- Substantial cause is defined as 35%-40% of the psychiatric injury.
- Employers have the burden of establishing this defense.

Personnel Actions Defined

- The Courts have defined “personnel action” as "conduct either by or attributable to management including such things as done by one who has the authority to review, criticize, demote, or discipline an employee.“(***Larch v. Contra Costa County*** (1998) 63 Cal. Comp. Cases 831, 835; ***Stockman v. Department of Corrections*** (1998) 63 Cal. Comp. Cases 1042, 1045.)

- Personnel actions may include but are not necessarily limited to
  - Transfers
  - Demotions
  - Layoffs
  - Performance evaluations
  - Disciplinary actions such as warnings or suspensions
  - Terminations of employment.

Changes in Working Conditions are Not Personnel Actions

- The WCAB has held changes in an employee's working conditions do not constitute personnel actions. So, personnel actions do not include:

  - A change in job requirements. (***San Luis Obispo Tribune, LLC v. WCAB (Ecker)*** (2011) 76 CCC 1369 (writ denied).)
  - Increased workload and stressful working conditions. (***Joe v. County of Santa Clara-Probation Department***, 2015 Cal. Wrk. Comp. P.D. LEXIS 352.)
  - A significant change of work duties without adequate training. (***Vayser v. Tarzana Treatment Centers***, 2016 Cal. Wrk. Comp. P.D. LEXIS 508.)
  - Implementation of a new computer system. (***Alde v. Children's Hospital and Health of San Diego***, 2014 Cal. Wrk. Comp. P.D. LEXIS 87.

- Although these were not considered personnel actions, they were considered actual events of employment.

Analyzing a Psychiatric Claim Arising from COVID-19

- If an applicant alleges a psychiatric claim, a physician must determine whether applicant has a psychiatric injury.

- If so, the physician must break down the different causes of it, whether industrial or nonindustrial, and provide the different percentages of causation.

  - Nonindustrial stressors (e.g., general anxiety and fear from COVID-19, family stressors, preexisting psychiatric conditions, etc.)

  - Industrial stressors (e.g., work-related injuries, harassment, changes in job duties, layoff, termination, etc.)

- The courts must determine whether the causes were actual events of employment, and if so, whether they were personnel actions.

Six-Month Rule

- Pursuant to Labor Code § 3208.3(d), in order to bring a claim for a psychiatric injury, the employee must have been "employed by that employer for at least six months."
- The Courts have stated § 3208.3(d) applies to "*all* claims for psychiatric injury.“ (***Wal-Mart Stores v. Workers’ Comp. Appeals Bd.*** (2003) 112 Cal. App. 4th 1435.)
- The only exception is if the "psychiatric injury is caused by a sudden and extraordinary employment condition.“
- The nature of an injury is not considered in determining whether the psychiatric condition is caused by a “sudden and extraordinary employment condition.” (***Travelers Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (Dreher)*** (2016) 246 Cal. App. 4th 1101.)

Application of Six-Month Rule to COVID-19

- The COVID-19 outbreak is "extraordinary," but it would be difficult to classify as "sudden.“
- Contracting COVID-19 alone likely would not constitute a sudden and extraordinary employment condition.
- Most employees who contract COVID-19 at work during the first six months of employment likely would not be able to pursue a claim for psychiatric injury.
- Even if a psychiatric injury is barred by § 3208.3(d), an employee could receive psychiatric treatment if it is necessary to cure or relieve an employee from the effects of an industrial injury.

Psychiatric Impairment from COVID-19

- Labor Code § 4660.1(c) bars impairment — permanent disability — for a psychiatric, sexual or sleep disorder "arising out of a compensable physical injury.“
- The statute bars impairment for psychiatric injuries which are compensable consequence of a physical injury. It does not apply to psychiatric injuries directly caused by the employment.
- Psychiatric injuries caused by "actual events of employment" (other than physical injuries) pursuant to § 3208.3(b)(1) would not be barred.
- Because the law recognizes a distinction between injuries and diseases, it is likely § 4660.1(c) does not apply to psychiatric injuries flowing from COVID-19, because COVID-19 is a disease not a physical injury.
- Even if permanent impairment is barred by § 4660.1(c), employees could still receive other benefits (i.e., temporary disability or medical treatment) for a psychiatric injury flowing from a COVID-19 diagnosis.

Recording and Reporting Requirements

- Cal/OSHA and OSHA agree that employers must record cases of COVID-19 only if all of these apply:

  1. The case is confirmed as COVID-19.
  2. The case is work related, as defined by 29 C.F.R. § 1904.5.
  3. The case involves one or more of the general recording criteria defined in 29 C.F.R. § 1904.7 (that is, medical treatment beyond first aid, or days away from work).

- COVID-19 is considered to be a confirmed case — when an individual has at least one respiratory specimen that tested positive.

- For cases in which “it is not obvious whether the precipitating event or exposure occurred in the work environment or occurring away from work,” the employer “must evaluate the employee’s work duties and environment” to determine work relatedness.

Retaliation Prohibited

- The COVID 19 pandemic probably will prompt an uptick in workplace health and safety complaints.
- Taking adverse action against any employee *because* he or she made a health and safety complaint could be considered retaliatory.
- Employees who make a good-faith oral or written complaint about their workplace safety to the employer, the employee's representative (a union rep) or governmental agencies are protected from retaliation even if the complaint turns out to be unfounded.

Independent Contractor Misclassification

- Dynamex & AB 5
- Workers are presumed to be employees, not independent contractors
- The “ABC” Test:
  - The worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact.
  - The worker performs work that is outside the usual course of the hiring entity’s business. And
  - The worker is customarily engaged in an independently established trade, occupation or business of the same nature as the work performed for the hiring entity.

Exemption Misclassification

- Are your workers truly exempt?
- Salary requirement
  - Most exemptions require employees to be paid twice the California minimum wage.
- Duties requirement (quantitative)
  - Does the employee spend more than 50% of his or her time engaged in exempt duties?
- Discretion and judgment are key
  - Does the employee exercise discretion and judgment in making decisions or recommending decision to management?

Guidance for Employers

Work with your leadership team to develop a comprehensive strategy for employees to return to work.

Michael Sullivan & Associates provides services that include:

- Employee handbook & personnel policy review
- Work plan guidance - a staggered approach that incorporates phased implementation
- Return to work seminars
- Customized plans of action & COVID-19 advising

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We look forward to serving your legal needs

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